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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARK F. SHEHATA,

Plaintiff and Appellant,

v.

DANA COLE,

Defendant and Respondent.

B231009

(Los Angeles County  
Super. Ct. No. BC446439)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Michelle R. Rosenblatt, Judge. Affirmed.

Mark F. Shehata, in pro. per., for Plaintiff and Appellant.

Cole & Loeterman, Dana M. Cole for Defendant and Respondent.

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Plaintiff Mark Shehata sued his criminal defense attorney, defendant Dana Cole, for legal malpractice in connection with a criminal proceeding which resulted in a plea of no contest. Defendant demurred based on plaintiff's failure to allege "actual innocence" as shown by postconviction exoneration, a required element of a claim for legal malpractice in a criminal matter. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201.) When plaintiff failed to make an offer of proof in response to the trial court's inquiry, the court sustained the demurrer without leave to amend, and entered a judgment of dismissal. Plaintiff appeals. Finding no error, we affirm.

Plaintiff's complaint contains two causes of action for negligence based upon defendant's legal representation of plaintiff in a criminal proceeding. Plaintiff pled no contest to two counts of violating Penal Code section 530.5, subdivision (a) (unauthorized use of personal identifying information of another); one count of violating Penal Code section 502, subdivision (c)(1) (obtaining access to a computer network in order to wrongfully obtain money), and one count of violating Penal Code section 487, subdivision (a) (theft exceeding \$400). He was convicted and sentenced to state prison for a term of 28 months. On appeal, we affirmed plaintiff's conviction. (*People v. Shehata*, B210364, filed on July 8, 2009.) Plaintiff subsequently unsuccessfully sought habeas corpus relief in both state and federal courts.<sup>1</sup>

Plaintiff does not allege actual innocence, that is, that his conviction has been overturned by post-conviction relief. He therefore cannot allege an element necessary to a cause of action against his criminal defense attorney based on his legal representation in the criminal proceeding. (*Coscia v. McKenna & Cuneo, supra*, at p. 1201 ["an individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action."].)

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<sup>1</sup> At defendant's request and pursuant to Evidence Code sections 451 and 452, we take judicial notice of the court orders denying plaintiff's petitions for writs of habeas corpus filed in state and federal court.

On appeal, plaintiff maintains that he could amend his complaint to allege breach of contract instead of negligence, which cause of action does not require an allegation of actual innocence. Plaintiff is mistaken. While a claim for legal malpractice may be sound in either contract or tort (*Neel v. Magana, Olney, Levy, Cathcart and Gelfand* (1971) 6 Cal.3d 176, 181), a malpractice claim based on legal services rendered in a criminal proceeding can succeed only if the plaintiff pleads and proves actual innocence. (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1189.)

In sum, the demurrer was well-taken.

#### DISPOSITION

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.